

6 Official Opinions of the Compliance Board 151 (2009)

Exceptions Permitting Closed Session – Legal Advice – Discussion of alternatives to county’s request for Waiver of Maintenance of Effort Funding Level violated Act

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Justin Palk
The Frederick News-Post

The Open Meetings Compliance Board has considered your complaint that the Frederick County Board of Education (“County Board”) may have violated the Open Meetings Act on April 7, 2009, when it conducted a closed meeting with its legal counsel in connection with Frederick County Commissioners’ request to the State Board of Education for a waiver of the County’s maintenance of effort funding obligations.

The County Board was entitled to consult with legal counsel in connection with this matter in a closed meeting. However, at some point during the closed session, discussion appears to have gone beyond the mere rendering of legal advice. As a result, we find that the County Board violated the Act.

I

Complaint and Response

According to the complaint, on April 7, 2009, at 1:00 p.m., the County Board convened a “special planning meeting” to consider its response to a requested waiver filed by the Frederick County Commissioners with the State Board of Education under the State’s maintenance of effort statute. According to publicly-available minutes, upon starting the meeting, the County Board voted to go into a closed session under §10-508(a)(7)¹ “to consult with counsel regarding the [County] Board’s legal position and response to current statutory action filed.” The closed session lasted until approximately 2:20 p.m. A summary of the closed session reported in a draft copy of publicly available minutes indicated that “[n]o formal action was taken.” The County Board then conducted a public meeting at which time the County Board voted to oppose

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

the County government's request apparently without any discussion. The public meeting was reported to have ended at 2:22 p.m.

Included with the complaint was a April 17, 2009, article from the *Frederick News-Post* reporting that County Board Present Jean Smith had said that "[t]he closed session was just to discuss whether or not to oppose the waiver request ... And we had to be sure all the board members agreed we should do this." It was also reported that Ms. Smith indicated that the County Board discussed its strategy for filing a response to the waiver request. Based on the lack of public discussion at the 2:20 p.m. meeting and Ms. Smith's comments to the press, the complaint alleged that it appears the closed session involved more than seeking legal advice in connection with the waiver issue.

In a timely response on behalf of the County Board, Jamie R. Cannon, Executive Director of Legal Services for the Frederick County Public Schools, provided additional background in connection with the April 7 closed session. Andrew W. Nussbaum, the County Board's outside counsel, and Ms. Cannon were present to provide legal advice in connection with the statutory and regulatory provisions regarding maintenance of effort waivers. In the waiver request, the County Commissioners were requesting the State Board of Education to allow in essence an appropriation to the County Board reduced by over \$9 million.

On April 6, the County Board was notified by the Maryland State Department of Education of the need to file an electronic copy, along with paper copies, of any response to the County Commissioners' request. Immediately thereafter, the County Board decided to convene a closed session to consult with counsel "to obtain advice on the requirements of Maintenance of Effort, the legal implications of the [County Commissioners'] requesting a waiver, and the various options available to the Board to respond to th[e] requested waiver."

Citing 3 *OMCB Opinions* 16, 20 (2000), the response noted that a public body is entitled to meet in closed session to hear from its lawyer on how to comply with any law affecting its operation. After the closed session, the County Board immediately convened a public session to openly vote to oppose the waiver requested by the County Commissioners. According to the response, "the discussion in closed session revolved around the issue of the legal implications and ramifications of an action by the [County Commissioners] that would cost the [County] Board over \$9 million in funding. It should not be surprising that after that discussion, it did not take the Board much time in open session to vote to oppose the waiver." The County Board's position is that it appropriately applied the §10-508(a)(7) exception is conducting the closed session on April 7.

The County Board included with its response, among other documents, a draft copy of the minutes of the closed session held April 7² and an affidavit of Ms. Jean Smith, President of the County Board. The latter document provided, in part, that “the comment [Ms. Smith made] that the closed session was to discuss opposing the waiver request ...occurred in the scope of seeking legal advice about the Board’s legal strategy with regard to the law and the Board’s legal options.”³

II

Analysis

Clearly, a public body such as the County Board is entitled to meet in a closed session to “consult with counsel to obtain legal advice,” as long as the procedural requirements of the Open Meetings Act are followed. §10-508(a)(7). However, like any exception under the Act under which a meeting may be closed, the exception for legal advice is to be strictly construed. §10-508(c). As we have consistently advised, this exception extends only to the interchange between a public body and its legal counsel during which legal advice is being provided. *See, e.g., 5 OMCB Opinions* 130, 133 (2007). As the County Board correctly noted in its response, the term “legal advice” is not defined for purposes of the Act, but is “generally understood to mean the lawyer’s ‘interpretation and application of legal principles to specific facts in order to guide future conduct.’” *4 OMCB Opinions* 58, 59 (2004), *citing* Rice, *Attorney-Client Privilege in the United States* 65 (2d ed. 1999). However, §10-508(a)(7) does not extend to further discussions, even though the subject matter may well have legal implications.

We have no reason to doubt that a significant portion of the discussion during the closed session on April 7 would qualify as legal advice. Understanding how the waiver process operates under the applicable law, the impact of a waiver under the applicable funding formula, and the legal options of the County Board before the State Board of Education are all matters on which the County Board could be expected to want to hear from counsel.

Nevertheless, based on the record before us, we believe the discussion crossed the permissible line of a closed session under §10-508(a)(7). To

² Unless the public body chooses to make the minutes of the closed session public, the Compliance Board is required to maintain the document’s confidentiality. §10-502.5(c)(2)(iii).

³ Although not germane to our review of this matter, we note that at some point, the Frederick County Commissioners withdrew the waiver request.

suggest the entire discussion qualified as legal advice is untenable. A draft response to the State Board of Education was distributed during the closed session for the County Board's review. Although the County Board did not share that document with us, we can only assume that the document addressed the County Board's position as to the merits of the County Commissioners' request and the impact it would have on the school system. In fact, the County Board's own record makes clear that the discussion reflected the belief that alternatives to the waiver were available. Thus, in our view, at some point during the closed meeting, the discussions went beyond a request for legal advice and involved a substantive consideration of the County Commissioners' request. To the extent that the County Board considered the merits of the County Commissioners' request and alternatives that might be available to satisfy the County's funding obligation, the County Board exceeded the perimeters of §10-508(a)(7), thus, violating the Act.⁴

III

Conclusion

In summary, the County Board was entitled to meet with its counsel in closed session to receive legal advice in connection with the request that the County Commissioners had filed with the State Board of Education for a waiver of the County's maintenance of effort funding obligation. However, based on our review of the record, at some point during the closed session, discussion appears to have gone beyond the mere rendering of legal advice. As a result, we find that the County Board violated the Act.

OPEN MEETINGS COMPLIANCE BOARD

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⁴ In its response, the County Board noted that the complainant presented no evidence that the County Board discussed anything other than legal advice. Of course, the complainant was not in attendance during the closed door discussions. Only the members of the County Board and others in attendance were privy to the conversation. In any event, if the County Board meant to suggest that the complainant should shoulder the burden of proof in establishing a violation, the short answer is that neither party bears a burden of proof under the Compliance Board's complaint process. 6 *OMCB Opinions* 69, 72 (2009).